

125  
①

Supreme Court, U.S.  
FILED

No. 081251 APR 7 - 2009

In The OFFICE OF THE CLERK  
SUPREME COURT OF THE UNITED STATES

Burriss Electrical, Inc ..... Petitioner,

v.

Occupational Safety and Health, South  
Carolina Department of Labor .....  
Respondent.

---

On Petition for Certiorari to the Supreme  
Court of the State of South Carolina

---

PETITION FOR A WRIT OF CERTIORARI

---

Charles F. Thompson, Jr.  
Malone, Thompson & Summers  
339 Heyward Street  
Columbia, S.C. 29201  
803-254-3300  
Attorney for Petitioner

## QUESTIONS PRESENTED FOR REVIEW

1) Did the South Carolina Court of Appeals err in finding that Burriss knowingly violated OSHA and deliberately subjected employees to serious risk of harm based on a prior OSHA citation that had been withdrawn and involved very dissimilar facts?

2) Did the South Carolina Court of Appeals ignore uncontested evidence that Burriss had no appreciation of the OSHA standards, or the danger, and therefore could not have willfully violated OSHA?

3) Did the South Carolina Court of Appeals incorrectly find that Burriss deliberately ignored OSHA when, in fact, the uncontroverted evidence is that Burriss was very careful about the safety issues it knew about?

## **List of Parties**

- 1) Burriss Electrical, Inc. Burris Electrical Inc. has no parent corporation and no publicly held company owns 10% or more of Burris Electrical Inc.
- 2) Occupational Safety and Health, South Carolina Department of Labor

## TABLE OF CONTENTS

Questions Presented. . . . .	i
List of Parties. . . . .	ii
Table of Contents. . . . .	1
Table of Authorities. . . . .	2
Opinions Below. . . . .	3
Jurisdiction. . . . .	4
Statutes Involved in the Case. . . . .	5
Statement of the Case . . . . .	5
Argument: Reasons Why Certiorari Should be Granted . . . . .	11
Conclusion . . . . .	17
Appendix . . . . .	18
1. Order of the South Carolina Court of Appeals	
2. Order of the South Carolina Supreme Court	

## TABLE OF AUTHORITIES

### Cases

<i>A.E. Staley Mfg. Co. v. Secretary of Labor</i> , 295 F.3d 1341 (D.C. Cir. 2002) .....	11
<i>Donovan v. Mica Const. Co.</i> , 699 F.2d 431 (8th Cir. 1983) .....	11
<i>McKie Ford, Inc. v. Secretary of Labor</i> , 191 F.3d 853 (8th Cir. 1999).....	11
<i>St. Joe Minerals Corp. v. Occupational Safety and Health Review Com'n</i> 647 F.2d 840, 845 -846 (C.A.8, 1981)....	6
<i>Valdak Corp. v. Occupational Safety and Health Review Com'n</i> , 73 F.3d 1466 (8th Cir. 1996).....	11
<i>Wright and Lopez, Inc.</i> , 8 BNA OSHC 1261, 1980 CCH OSHD ¶ 24,419 (No. 76-3743, 1980).....	10

### Statutes

29 U.S.C.A. § 666 (1990).....	5
SCCR 71, 1-1926.651(k)(1).....	7
SCCR 71, 1-1926.652.(a)(1).....	8
SCCR 71, 1926.21(b)(2).....	8
SCRR 71, 1-1926.100(a).....	8
SCRR 71, 1-1926.651(c)(2).....	8

## OPINIONS BELOW

The opinion of the South Carolina Court of Appeals is unpublished and is reprinted in the Appendix hereto.

The order of the South Carolina Supreme Court denying certiorari is unreported and is reprinted in the Appendix hereto.

## JURISDICTION

This matter was originally heard before an administrative tribunal of the state of South Carolina. Under the Occupational Safety and Health Administration Act, South Carolina administers OSHA as opposed to the federal Department of Labor. The tribunal issued its decision on January 1, 2004 finding in favor of S.C. OSHA.

Under South Carolina law at the time, appeal was to a state circuit court. Burris Electrical appealed. A hearing was held and the circuit court issued its decision on August 3, 2006 upholding the decision on the tribunal.

Burris Electrical appealed to the South Carolina Court of Appeals and that court issued its decision affirming the circuit court on January 23, 2008 and denied Burris Electrical's Petition for rehearing on April 18, 2008.

Burris Electrical filed a writ of certiorari to have the decision of the Court of Appeals reviewed by the Supreme Court of South Carolina. The South

Carolina Supreme Court denied the writ, without an opinion, on January 8, 2009.

This Court has jurisdiction to hear the final decision of the Supreme Court of the State of South Carolina.

## STATUTES INVOLVED IN THE CASE

(a) Willful or repeated violation

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation.

29 U.S.C.A. § 666 (1990)

“Willful violation is nowhere defined in the Act, and the legislative history is sketchy. Thus, the Commission and the courts are charged with determining the meaning of willfulness in light of the policy and framework of the Act.”

*St. Joe Minerals Corp. v. Occupational Safety and Health Review Com'n* 647 F.2d 840, 845 -846 (C.A.8, 1981).

## STATEMENT OF THE CASE

Bad facts make for bad law. This Petition concerns a narrow but extremely important question

about how OSHA violations should be classified. The lower courts in this case have let the tragic nature of the underlying facts cheapen the most egregious classification of "willful violation" and thereby unfairly blacken the name of the Petitioner. If the lower decisions in this case are allowed to stand then a willful violation will be found anytime an employer does not consult the proper OSHA standards and willful can be based on prior citations even though the prior citations was withdrawn by OSHA and arose from very dissimilar facts. Instead, the highest regulatory condemnation should be reserved for cases in which the employer knowingly violated the law or, by its conduct, demonstrates it would have violated the law even if it had been aware of it.

A "willful violation" should be (and is) reserved for employers who either knowingly violate OSHA or for employers who unknowingly violate OSHA but the evidence shows they would have violated it even if they had known of OSHA requirements. The only evidence in this case is that Burriss made mistakes that led to a deadly accident. Burriss never would have willfully violated OSHA and never would have deliberately exposed its employees to a dangerous risk.

Burriss is a small, family-run, minority-run, electrical systems company. Burriss was the electrical contractor for the building of the Blythewood High School in Blythewood, South Carolina in 2002 and 2003. (R. 28, Hearing Tr. 10).

On January 28, 2003 Burriss Electrical was digging a trench for electrical conduit at the Blythewood site. The trench was eight foot deep and was far deeper than any trench Burriss had ever

dug. The operation was being supervised by a foreman that had no experience in ditches this deep. On the morning of January 28, several Burriss employees were working in the trench when a portion of the trench wall collapsed. The cave-in partially buried two of the employees and caused their deaths. (R. 32, Hearing Tr. 14).

Unbeknownst to Burriss, the trench was unsafe under OSHA standards for several reasons. First, OSHA requires a trench over four foot deep to have the side walls either sloped back or protected from collapse by a protective box. Second, OSHA requires a "competent person" (one trained on how to apply OSHA trenching rules) to inspect the trench daily. Finally, OSHA requires certain means of escape no at issue in this case.

Burriss Electrical is owned by Christie Burriss. The project manager for Burriss Electrical is her husband Tommy Burriss. (R. 77, Hearing Tr. 59). Mr. Burriss is the only management level employee in the company in charge of production. He relies on superintendents at each job site to manage day to day operations. (R. 77, Hearing Tr. 59). Mr. Burriss visits each site approximately once a week. (R. 77, Hearing Tr. 59).

It is uncontested that the Burriss Electrical rarely faced safety issues other than fall-protection and electrocution. (R. 80-81, Hearing Tr. 62-63). Burriss Electrical provided safety training on these issues. (R. 80, Hearing Tr. 62). Other than minor scrapes, the only significant injury a Burriss employee ever suffered was to fall and break an elbow. (R. 80, Hearing Tr. 62). This occurred some ten years prior to the cave-in. (R. 80, Hearing Tr. 62).

Burriss Electrical had never before dug a trench greater than two to four feet deep. (R. 81, Hearing Tr. 63). OSHA's investigator even admitted that the trench at the Blythewood cite was unprecedented for Burriss Electrical. (R. 70, Hearing Tr. 52). In fact, Mr. Burriss had no idea that the Blythewood employees had dug the trench 8 feet deep and was "extremely shocked" when he saw the ditch for the first time. (R. 84, Hearing Tr. 66). Notably, Mr. Burriss was anticipating the trench was only going under a three foot foundation. (R. 83, Hearing Tr. 65). If he had known the digging was eight feet deep, Mr. Burriss would have stopped the work and consulted someone with experience in trenching. (R. 85 Hearing Tr. 67). It is uncontested that neither Mr. Burriss nor Burriss Electrical (including the supervisor at the Blythewood site) had experience in trenching deeper than four feet and were unaware of the OSHA regulations requiring sloping or protective devices for trenches in excess of four feet. Likewise, they were not aware of the need to have a "competent person" (as defined by OSHA regulations) inspect the trench. (R. 85-87, Hearing Tr. 67-69).

The accident was simply a tragic accident born of a lack of knowledge about proper trenching techniques. There was not one shred of evidence that anyone with Burriss knew of the OSHA trenching standards or proceeded despite knowing of the danger.

Following an inspection of the cave-in, Complainant issued two citations consisting of five violations:

#### Citation 4

1. SCCR 71, 1-1926.651(k)(1) Failure to make daily inspections of excavations . . . by a competent person,

### Citation 3

1. SCCR 71, 1926.21(b)(2) Failure to instruct each employee [on proper trenching] . . . no trench hazard recognition and avoidance safety training provided to employees in trench in excess of 7 feet deep . . .

2. SCRR 71, 1-1926.100(a) Failure to require employees working in areas where there is a possibility of head injury . . . no protective helmets worn by 4 employees in trench in excess of 7 feet deep at Building C area.

3. SCRR 71, 1-1926.651(c)(2) Failed to locate a stairway, ladder, ramp or other safe means of egress in trench excavation . . .

4. SCCR 71, 1-1926.652.(a)(1) Failed to protect each employee in an excavation from cave-in by an adequate protection system [and] SCCR 71, 1-1926.652(b)(1)(i) Failed to slope excavations at an angle not steeper than one and one-half horizontal to one vertical . . .

Following the accident, Burriss Electrical fully cooperated with OSHA and spent considerable resources improving its safety program. Burriss destroyed the trench where the accident occurred

and started over with a new trench that exceeded OSHA standards. (R. 117-123, Hearing Tr. 101-107).

Burriss Electrical did not contest the validity of any of the citations and did not contest the classifications of any of the violations within citation 3. The sole issue contested by Burriss Electrical was the classification of citation 4 as "willful."

**The Trial Court:** The trial court found willfulness based on evidence that Burriss could have know of the proper safety standards, should have known of them, and had the opportunity to learn of the appropriate standards. (R 15-17, Order, pp. 5-7). That court flat ignored the requirement that it find a knowing violation or that Burriss proceeded in the face of an appreciated risk. In addition to misapprehending the appropriate legal standard, the trial court got very sidelined with an incorrect perception that Burriss was trying to plead ignorance as a defense to a finding of willfulness. The real task, which the trial court ignored, was to find evidence that Burriss would have proceeded even if it knew of the applicable safety standards. The only evidence cited by the trial court that came close to addressing the OSHA's unmet burden is evidence that Burriss Electrical was cited in the past for not having a competent person. As explained below, however, this could not be used to support a finding of willfulness.

The trial court also misapprehended Tommy Burriss' testimony as an admission that he knew (prior to the accident) that his foreman was not a "competent person" as that term is defined under the OSHA regulations. In addition the trial court incorrectly noted as important that Burriss had

opportunity to learn of the trench condition. (R. 16, Order p. 6). Finally, the trial the court misapprehended that Mr. Burriss had knowledge before the accident that the trench was "dangerous" and "horrifying." (R. 16, Order p. 6).

**The Court of Appeals:** The Court of Appeals continued the errors of the trial court. That court affirmed the trial court by agreeing that the prior citation could be used as evidence that Burriss did know of the requirement to have a competent person on trenching. Like the trial court, the Court of Appeals also ignored the uncontested evidence that Burriss clearly did not know the technical meaning of "competent person" nor was it aware of the danger and therefore could not have willfully violated OSHA. The Court of Appeals disregarded caselaw making clear that, before a prior incident could be used to find a willful violation, it must involve similar factual circumstances. Finally, the Court of Appeals was clearly wrong in finding that Burriss ignored OSHA safety standards.

## **ARGUMENT**

**The Court Incorrectly Used a Prior Citation as Evidence that Burriss Knew of the Requirement for a Competent Person on Trenching**

The touchstone of the court of appeal's decision is that Burriss knew of the OSHA "competent person" standard prior to the 2003 accident because Burriss had been cited, and had not

appealed, a citation for the same standard in 2000. The court reasoned that, therefore, Burriss had opportunity to learn the standard, should have known the standard and therefore was consciously indifferent toward it. There are several critical errors in this chain of logic.

First, Burriss did appeal the 2000 "competent person citation." The court of appeals mistakenly found that Burriss only appealed a citation for a scaffolding issue that was issued by OSHA at the same time. However, both citations were issued under the same "Report Number 0185-01." (R. 168). By letter dated September, 20, 2000, Burriss clearly appealed "Report Number 0185-01." (R. 170). Uncontestably, this included both citations and therefore both citations were appealed.

What happened next is also irrefutable. The competent person citation disappeared and was neither discussed, nor pursued by OSHA, nor incorporated in the settlement agreement that resolved Burriss' appeal. (R. 165). The testimony makes this clear as well. OSHA never discussed the competent person citation with Burriss. The entire focus was on the scaffolding citation. (R. 87-89, Hearing Tr. 69-71). The competent person citation was not discussed in the informal conference, nor in the settlement discussions, and was dropped from, and played no part in, the settlement agreement. (R. 86, Hearing Tr. 68); (R. 87-89, Hearing Tr. 69-71, R. 161, Ex. 1).

It is outrageous that the court of appeals bases a willful finding on a citation that was dropped by OSHA. In basing its decision finding a willful violation based on a prior citation that was dropped by OSHA, the court is effectively using a dismissed

charge as a prior conviction. This must be incorrect or else OSHA could always establish willfulness by simply charging employers with baseless allegations and then withdrawing them. It is denial of a fundamental fairness to use prior charges against employers when those charges are dropped or dismissed.

**Even If The Court of Appeals Could Consider the Prior Charge, There is Still No Evidence that Burriss Intentionally Avoided Knowledge or Consciously Disregarded the Standard**

Even if the court could have properly considered the withdrawn charge, it inappropriately concluded that Burriss intentionally disregarded this notice of the proper standard. Despite correctly noting that a simple "indifference" to the prior charge or notice of the standard was not enough to support a finding of willfulness,<sup>1</sup> the court of appeals found that Burriss "intentionally disregard[ed]" that knowledge.

There was no evidence of intentional disregard of the standard. In fact, the evidence makes clear that Burriss simply did not know about and did not understand the competent person standard.

Q: Did you know anything about the OSHA trenching standards?

---

<sup>1</sup> "an Employer's mere familiarity with the requirements of an applicable standard does not, in itself, establish willfulness." *Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶ 24,419 (No. 76-3743, 1980).

A: No

Q: Did you know what a competent person meant?

A: No.

(R. 85, Hearing Tr. p. 67).

Q: I didn't remember the one that addressed the competent person. I remember the one that addressed the scaffolding issue.

(R. 86, Hearing Tr. p. 68)

A: Basically, the way I interpreted it at the time of this document and before the accident that we did not have a competent person on site . . . now that I know what a competent person definition is by OSHA and my definition are two different things

(R. 97, Hearing Tr. p. 79).

OSHA did not introduce any evidence to refute Mr. Burriss testimony on this point. In fact, OSHA itself is to blame for Mr. Burriss's failure to understand or appreciate the prior standard because OSHA placed no emphasis upon it and dropped the citation from the report. Had OSHA emphasized this charge, or had at least not dropped it, it is likely that Mr. Burriss would have noticed it, appreciated it, and taken action to correct it.

There is flatly no evidence that Burriss ignored knowledge gained from a prior citation. The court of appeals did not cite a single piece of evidence to support this conclusion.

**The Court Failed to Address the Fact that the Prior Citation Could Not Be Used as Notice Because the Factual Circumstances Were Entirely Different**

The court of appeals hinged its decision on the prior citation for failure to provide a competent person. However, courts have uniformly held that, for a prior incident to support a willful finding, the prior incident must clearly demonstrate, to the employer, the danger to be avoided. The court of appeals completely ignored this argument. See *Donovan v. Mica Const. Co.*, 699 F.2d 431 (8th Cir. 1983) (job foreman was aware of the prior cave-in and nevertheless instructed work to proceed, however, there was insufficient evidence of the nature and extent of the prior cave-in); *A.E. Staley Mfg. Co. v. Secretary of Labor*, 295 F.3d 1341 (D.C. Cir. 2002) (Willful violation found based on plain indifference where employer was aware that prisoner had been repeatedly injured by the same inmate before and took no action to prevent a recurrence); *McKie Ford, Inc. v. Secretary of Labor*, 191 F.3d 853 (8th Cir. 1999) (Willful violation through plain indifference found where employer knew employees were using a freight-only elevator and one employee had been injured on the freight elevator before); *Valdak Corp. v. Occupational Safety and Health Review Com'n*, 73 F.3d 1466 (8th Cir. 1996) (Willful violation through plain indifference found where employer knew that a safety device was broken and knew that the safety device was the only thing that prevented the injury involved).

The court ignored this argument probably because the evidence that was presented makes clear that the prior citation (even if it had not been withdrawn) was completely dissimilar to the Blythewood situation. The prior trench did not involve a danger to employees, was not under the

same circumstances, was a shallow trench, OSHA did not discuss the citation with Burriss, imposed no penalty, and OSHA dropped the citation from the final settlement. Therefore, the prior situation was completely unlike the Blythewood situation and, therefore did not put Burriss on notice of the danger.

### **The Court Erred in Finding that Burriss Made No effort to Acquaint Itself with Safety Standards**

The court of appeals also erred in finding that there was evidence that Burriss made no effort to acquaint itself with safety standards. To the contrary, the record is clear that Burriss was well aware of the dangers common to its operations, *e.g.*, electrocution and fall protection. It is uncontested that the Burriss Electrical rarely faced safety issues other than fall-protection and electrocution.

Q: Before this accident, What were your primary concerns about safety?

A: I would say fall protection and electrocution.

...

A: ... We had training on fall protection. We discuss heat related injuries and I would visit the jobsites a lot of times and would communicate to the guys, say I feel there's a potential issue here ...

(R. 80-81, Hearing Tr. 62-63).

In fact, there was no evidence submitted by OSHA that Burriss was unaware of other OSHA regulations. The trial judge and the court of appeals misread the testimony on this point. What the

OHSA witness testified was that Burriss was unaware of the trenching standards. (R. 70). Thus, the court of appeals and the trial court, erred in finding Burriss was not aware of the regulations or safety standards in general.

## CONCLUSION

What the court of appeals has done is to cheapen the willful classification and make it applicable based on a prior citation even though that prior citation was withdrawn and was completely dissimilar. The decision also makes the willful classification apply to any case in which the employer could have learned of the applicable OSHA citation and failed to do so. This would make it applicable in any case. Instead, this Court should correct this misapplication and re-establish that willful only applies when an employer deliberately violates OSHA or the evidence is such that, even if it had known of the correct OSHA standard, it would have violated it anyway.

Respectfully submitted

---

Charles F. Thompson, Jr.  
Malone, Thompson, Summers & Ott  
339 Heyward Street  
Columbia, S.C. 29201  
803-254-3300  
Attorney for Appellant

May 7, 2008

## **APPENDIX**

### **THE STATE OF SOUTH CAROLINA**

#### **In The Court of Appeals**

**Burriss Electrical, Inc., Appellant,**

**v.**

**Office of Occupational Safety and Health, South  
Carolina Department of Labor, Licensing and  
Regulation, Respondent.**

**Appeal From Lexington County  
Clyde N. Davis, Jr., Circuit Court Judge**

**Unpublished Opinion No. 2008-UP-070  
Submitted January 2, 2008 – Filed January 23, 2008**

### **AFFIRMED**

**Charles F. Thompson, Jr., of Columbia, for  
Appellant.**

**Joseph N. Connell, of Lugoff, for Respondent.**

**PER CURIAM:** Burriss Electrical, Inc. (Burriss) appeals from a South Carolina Occupational Safety and Health Review Board (the Review Board) decision finding Burriss in willful violation of the South Carolina Occupational Safety and Health Regulation 71, 1-1926.651(k)(1)(1991)[1]. After two employees were killed when a vertical wall of an earthen trench collapsed, the Office of Occupational Safety and Health in the South Carolina Department of Labor, Licensing and Regulation (the

Department) cited Burriss for four serious violations and one willful violation of the South Carolina Occupational Safety and Health Regulation (the Act). Burriss appeals the citation for the willful violation, arguing that (1) the Review Board misapplied the legal standard for willful conduct in reaching a finding of willfulness; and (2) under an appropriate application of the standard there exists no substantial evidence to support a finding Burriss committed a willful violation. We affirm.[2]

### FACTS

Burriss is an electrical systems contractor.[3] During 2002 and 2003, Burriss served as the electrical contractor for the building of the Blythewood High School in Blythewood, South Carolina. At the Blythewood site, Burriss dug a trench approximately 121 feet long in order to install feeder conduit for power and data communications underneath the building. Roughly eighty feet of the trench measured from six to eight feet deep, making that portion of the trench wall essentially vertical.

On the morning of January 28, 2003, a portion of the trench wall collapsed on several Burriss employees working in the trench. The cave-in partially buried two of the employees and caused their deaths. The Department sent an inspector to conduct a fatality inspection of Burriss' Blythewood site. As a result of the inspection, Burriss was cited for four serious violations (Citation 3 parts 1, 2, 3, and 4) and one willful violation (Citation 4).[4] The violations are as follows:

Citation 3 (Serious)

1. SCCR 71, 1-1926.21(b)(2) - Failure to instruct each employee in the recognition and avoidance of unsafe conditions. . . no trench hazard recognition [or] avoidance safety training provided to employees in trench in excess of 7 feet deep . . .

2. SCCR 71, 1-1926.100(a) - Failure to require employees working in areas where there is a possibility of head injury . . . to be protected by helmets [in that] . . . no protective helmets [were] worn by 4 employees in [a] trench in excess of 7 feet deep . . .

3. SCCR 71, 1-1926.651(c)(2) - Failed to locate a stairway, ladder, ramp or other safe means of egress in trench excavation that are 4 feet or more in depth . . .

4. SCCR 71, 1-1926.652(a)(1) - Failed to protect each employee in an excavation from cave-in by an adequate protection system [and] SCCR 71, 1-1926.652(b)(1)(i) - Failed to slope excavations at an angle not steeper than one and one-half horizontal to one vertical . . .

#### Citation 4 (Willful)

1. SCCR 71, 1-1926.651(k)(1) - Failure to make daily inspections of excavations . . . by a competent person for evidence of a situation that could result in possible cave-ins, . . .

A competent person is defined by the Act as:

[O]ne who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization

to take prompt corrective measures to eliminate them. In order to be a competent person for the purpose of this standard one must have had special training in, and be knowledgeable about soils analysis . . . the use of protective systems, and the requirements of this standard.

S.C. Code Regs. 71, 1-1926.650(b) (1991).

Burriss filed a notice of protest and a hearing was held before a single Review Board member. At the hearing, Burriss did not contest the four serious violations under Citation 3. The only issue before the Review Board member was the classification of a willful violation under Citation 4.

At the hearing, Tommy Burriss testified he had been to the Blythewood site a week prior to the excavation of the trench. He stated it was his understanding the trench was to be just over three feet deep. He further testified when he finally saw the trench on the day of the cave-in he was "extremely shocked to see that ditch that deep." He said "[i]t was horrifying" and "dangerous." He stated that had he been at the site he "would have told people to get out of [the] ditch . . . [t]here's just no way [he] would have exposed anybody to that."

When asked whether, at the time of the cave-in, he was aware of the Act's trenching regulations requiring a competent person to perform daily inspections, Tommy Burriss stated he was not aware of the regulations, nor did he have a copy of the OSHA standards, general standards, or construction standards. Yet, Tommy Burriss was questioned about an August 2000 citation issued at a Burriss' worksite at Stivers' Jeep. Burriss had both erected

scaffolding and dug a trench at the Stivers' Jeep worksite. With respect to the scaffolding, the Department cited Burriss for failure to install a guardrail along the sides and end of the scaffolding platforms, classified the violation as "serious," and proposed a \$300 fine. With respect to the trench, the Department cited Burriss for failure to perform daily inspections by a competent person pursuant to Regulation 71, 1-1926.651(k)(1) of the South Carolina Code. The Department classified the violation as "other than serious" and did not impose a fine therefor. Burriss protested the citation for the scaffolding violation and eventually entered a settlement agreement wherein Burriss agreed to pay a \$120 fine and "provide refresher training for its employees in fall protection." But, because no penalty was proposed for the citation for the trench violation, Burriss did not protest the trench violation.

Tommy Burriss admitted he read the Stivers' Jeep citation for lack of a competent person. Yet, at the time of the Blythewood site accident, Tommy Burriss testified he maintained the belief his site superintendant, David Marshall was "a competent person upon my definition." He admitted at the hearing, in hindsight, "now I know what a competent person definition is by OSHA and my competent person definition are two different things."

The Review Board member upheld the "willful" classification in Citation 4. Burriss filed a petition for review by the entire Review Board. The petition was denied. Burriss then appealed the matter to the circuit court. The circuit court affirmed the Review Board's denial of discretionary review as well as the

Review Board member's order upholding the citation and corresponding penalty. This appeal follows.

### STANDARD OF REVIEW

This court's review of an administrative agency's findings of fact is limited. The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact" when those facts are supported by substantial evidence. S.C. Code Ann. §1-23-380(A)(6) (2005)[5]; Dorman v. Dep't of Health & Env'tl. Control, 350 S.C. 159, 164-65, 565 S.E.2d 119, 122 (Ct. App. 2002). In determining whether the agency's decision was supported by substantial evidence, this court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the administrative agency reached. DuRant v. S.C. Dep't of Health & Env'tl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706-07 (Ct. App. 2004). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Id. at 420, 604 S.E.2d at 707. Further, the burden is on the appellant to prove convincingly that the agency's decision is unsupported by the evidence. See Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

A court can reverse an agency's findings, inferences, conclusions, or decisions if they are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of

discretion.” S.C. Code Ann. §1-23-380(A)(6) (2005). Further, a court may reverse where an agency’s decision is affected by an error of law. Id.

### LAW/ANALYSIS

Burriss asserts the circuit court misapplied the legal standard for a willful violation and argues, under an appropriate application of the standard, there is no substantial evidence to sustain a citation for a willful violation of the Act. We disagree.

The Act itself does not define “willful” nor has this court had an opportunity to interpret its meaning. In its decision, the Review Board member defined a willful violation as “committed voluntarily with intentional disregard *or* demonstrated plain indifference to the Act,” citing Occupational Safety and Health Law, Mark A. Rothstein, West’s Employment Law Series, St. Paul, Minn. 1998, §315. See also Valdak Corp. v. Occupational Safety and Health Review Comm’n, 73 F.3d 1466, 1468 (8th Cir. 1996) (finding to support a classification of “willful” there must be substantial evidence the employer, intentionally disregarded or was plainly indifferent to the requirements of the Act); Intercounty Constr. Co. v. Occupational Safety and Health Comm’n, 522 F.2d 777, 780 (4th Cir. 1975), cert. denied, 423 U.S. 1072 (1976). When faced with a problem of statutory construction, we accord great deference to the interpretation given the statute by the agency charged with its administration. See Dunton v. S.C. Bd. of Exam’rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (“The construction of a statute by the agency charged with its administration will be accorded the most

respectful consideration and will not be overruled absent compelling reasons.”).

In the context of occupational safety and health laws, willfulness requires more than the constructive knowledge or mere knowledge that would suffice for a non-willful violation, but does not require a showing of malicious intent. Intercounty Constr. Co., 522 F.2d at 780, cert. denied, 423 U.S. 1072 (1976). “An act may be ‘willful’ if the offender shows ‘indifference’ to the rules; he need not be consciously aware that the conduct is forbidden at the time he performs it, but his state of mind must be such that, if he were informed of the rule, he would not care.” AJP Constr., Inc. v. Sec. of Labor, 357 F.3d 70, 74 (D.C. Cir. 2004)(citation omitted).

Employers are presumed to be familiar with standards that affect their business; therefore, ignorance or even misunderstanding of the standards does not excuse noncompliance. Sec. of Labor v. Hallmark Excavating, Inc., 6 OSHC 1898 (1978). Similarly, an omission or failure to act is willful, if it is done voluntarily and intentionally. Havens Steel Co. v. Occupational Safety and Health Comm’n, 738 F.2d 397, 401 (10th Cir. 1984). Furthermore, a prior warning from OSHA may be a factor in determining if willfulness exists. Valdak, 73 F.3d at 1469.

Burriss contends the circuit court’s decision contains various misapplications of the willful standard and a misinterpretation of the evidence and testimony presented to the Review Board member.

The Review Board member found sufficient evidence to sustain a willful violation of the Act as follows:

The preponderance of evidence shows that [Burriss] demonstrated plain indifference to the Act in many ways . . . If not intentional disregard, [Burriss'] clear indifference to the Act is very apparent by the uncontested absence of knowledge of safety and health standards applicable or potentially applicable to a rapidly growing commercial electrical contracting business, lack of possession of copies of the OSHA standards for general industry or construction, lack of [Burriss]-provided training of employees and supervisors for *all* potential hazards of the job, reliance on general contractors to provide adequate safety training for one's employees, lack of attention to the warning represented by a previous citation related to a specific trenching safety practice that would have helped eliminate other violations, and lack of attention to the practices of other nearby contractors at the same job site as to trenching safety.

The circuit court likewise relied on similar evidence to uphold the finding of willfulness. The court stated the fact "[Burriss] made no effort to acquaint anyone, including itself, with the occupational safety and health regulations . . . [and] did not even possess a copy of the occupational safety and health standards" evidenced Burriss' plain indifference to general safety considerations.

We find there is evidence of a willful violation from the complete absence of knowledge by Burriss of the safety and health standards applicable to its business at the time of the cave-in. Burriss does not dispute he was previously cited for various violations of OSHA standards, one of which was similar to the citation at issue herein. As indicated, the circuit

court found Burris made no effort whatsoever to acquaint himself or anyone else with the applicable standards.

An intentional disregard or plain indifference to the required standards suffices to demonstrate a willful act. One cannot be aware of the existence of regulatory standards, have the means to review and learn them, consciously fail to do so and then use lack of knowledge as an excuse. To willfully turn one's head to knowledge and to understanding the requirements of the law after being exposed to a similar citation in the past is tantamount to a conscious act, a conscious disregard, which would meet the definition of a willful act. One's act of avoiding knowledge or completely disregarding it might also be labeled as an intentional and voluntary act. Arguably, some form of indifference, in and of itself, without more, may not rise to the level of a willful act. However, we need not reach that question since the type of indifference herein indeed rises to the level of a willful act or conscious disregard of the existence of the standards and is much more than just a misunderstanding or a mere negligent or careless act. The policy of the law does not provide a shield to one who is consciously aware of a regulatory scheme but intentionally disregards or chooses to disavow himself of, or avoid, such knowledge or requirements. To do otherwise would defeat the intent and goals of the regulatory scheme.

Because we find this evidence alone sufficient to support a finding of willfulness, we need not determine whether the circuit court erred in its application of the willful standard or interpretation

of the other evidence as suggested by Burriss. Accordingly, the circuit court's order is

**AFFIRMED.**

**HUFF and PIEPER, JJ., and GOOLSBY, A.J.,  
concur.**

[1] The text of Section 71, 1-1926.651(k)(1) does not appear in the South Carolina Code of Regulations. Instead, subarticle 7 indicates South Carolina law incorporates the federal Occupational Safety and Health Act (OSHA) Regulation 29 C.F.R. §1926, with a few exceptions. S.C. Code Regs. ch.71, subart. 7 (1991). This is the case with many other South Carolina Occupational Safety and Health Regulations. See e.g. S.C. Code Regs. ch.71, subarts. 6 & 8 (1991).

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

[3] Burriss is a family-owned business with Tommy Burriss as project manager and his wife, Christine Burriss, as president.

[4] In addition to citing an employer for a violation, the Department can classify the violation as: repeat, serious, or willful. S.C. Code Ann. §41-15-320 (Supp. 2006). Additional penalties are applied if any of these heightened classifications are used. Id.

[5] This court notes Act 387, effective July 1, 2006, has since modified S.C. Code Ann. §1-23-380 and certain appellate procedures. However, we review Burriss' claim pursuant to S.C. Code Ann. §1-23-380(A)(6) (2005) rather than S.C. Code Ann. §1-23-380(A)(5) (Supp. 2007) due to the fact the case arose under the prior appellate procedure. Regardless, as applied to this case, the only difference between the two statutes is the numbering of the statutory provisions.

## THE SOUTH CAROLINA COURT OF APPEALS

Burriss Electrical, Inc., Appellant,

v.

Office of Occupational Safety and Health, South  
Carolina Department of Labor, Licensing and  
Regulation, Respondent.

The Honorable Clyde N. Davis  
Lexington County  
Trial Court Case No. 2004-CP-32-01804

### ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After careful consideration of the  
Petition for Rehearing, the Court is unable to  
discover that any material fact or principle of law  
has either been overlooked or disregarded and hence,  
there is no basis for granting a rehearing.

It is therefore ordered that the Petition for  
Rehearing be denied.

/s/ Thomas E. Huff

/s/ Daniel Pieper

/s/ C. Paul Short

Columbia, S.C.

April 18, 2008

**THE SUPREME COURT OF SOUTH  
CAROLINA**

**Burriss Electrical, Inc., Appellant,**

**v.**

**Office of Occupational Safety and Health, South  
Carolina Department of Labor, Licensing and  
Regulation, Respondent.**

**The Honorable Clyde N. Davis  
Lexington County  
Trial Court Case No. 2004-CP-32-01804**

**ORDER DENYING PETITION FOR WRIT OF  
CERTIORARI**

**Petition for Writ of Ceriorari Denied.,**

**/s/ Jean H. Toal C.J.**

**For the Court**

**January 8, 2009**